FILE COPY

DEC 10 1918

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 745.

STANDARD VARNISH WORKS,
Libelant-Appellant,

vs.

S. S. *BRIS,*
REDERIAKTIEBOLAGET BORE,
Claimant-Appellee.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF CLAIMANT-APPELLEE.

CHARLES S. HAIGHT,
CLARENCE BISHOP SMITH,
Counsel for Owners of the Steamship Bris, Claimant-Appellee.

The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

SUBJECT INDEX.

PAGE

STATEMENT 1-2

FIRST POINT—GENERAL CONSIDERATIONS GOVERNING THE CONSTRUCTION OF PREPAID FREIGHT RETENTION CLAUSES 3-11

1. The Chambers and Allanwilde cases were exceptional. The goods did not go forward, because of a prohibition against the vessel..... 3
2. Examples of cases where the goods did not go forward, because the exporter failed to procure a license..... 5
3. One example where the license of the vessel was withdrawn..... 7
4. Risks run by shipowners in connection with war licenses..... 7
5. The shipowner's obligation under the bill of lading..... 8
6. War clauses 10

SECOND POINT—THE SHIPPER CANNOT RECOVER THE FREIGHT WHICH HE HAS PAID, BECAUSE THE CONTRACT BETWEEN THE PARTIES AUTHORIZES ITS RETENTION.....11-21

1. The leading authorities in the United States and England..... 11
2. Other authorities for the appellee.... 14
3. Cases of appellant said to be in conflict with the foregoing authorities.. 15
   (a) American authorities cited by appellant 15
   (b) English authorities cited by appellant 16

PAGE

4. The language of the freight retention clause in the case at bar leaves no room for implication 17
5. Chancellor Kent's case on the validity of an agreement that freight may be earned on shipment 18
6. The effect of the war clauses..... 20

THIRD POINT—THE APPELLANT'S CONTENTION THAT THE CONTRACT BECAME ILLEGAL OR DISSOLVED BY THE ACT OF THE GOVERNMENT, AND THAT CONSEQUENTLY THE SHIPPER CAN RECOVER THE FREIGHT, IS UNSOUND 21-24

FOURTH POINT—THE LIBELANT CANNOT RECOVER THE FREIGHT WHICH HE HAS PAID TO THE STEAMSHIP OWNER, WHO HAS ALWAYS BEEN READY TO PERFORM, SINCE THE GOODS WERE NOT CARRIED FORWARD BECAUSE OF THE SHIPPER'S OWN FAILURE TO PROCURE A LICENSE.....25-29

1. The shipper's knowledge that licenses must be obtained..... 25
2. Authorities on the exporter's duty to procure the license..... 26
3. It is not the ship, but the shipper which is in default..... 29

FIFTH POINT—THE CONTENTION OF APPELLANT THAT THE RETENTION CLAUSE IS AGAINST THE POLICY OF THIS COUNTRY AND CONTRARY TO THE HARTER ACT.....30-32

1. Public policy and the Harter Act allow the carrier to throw the risk of loss of the goods on the shipper when not caused by the carrier's negligence. Risk of loss of freight is similar.... 30

PAGE

2. The argument of public policy and the Harter Act, in this connection, a novel one 31

CONCLUSION 32

APPENDIX A—CASES SUSTAINING THE VALIDITY OF CLAUSES IN BILLS OF LADING WHICH PROVIDE THAT FREIGHT SHALL BE CONSIDERED "EARNED" ON SHIPMENT AND SHALL NOT BE SURRENDERED, "VESSEL OR CARGO, LOST OR NOT LOST" 33-44

1. The freight retention clause construed 33

2. The fact that the "Bris" did not "break ground," is immaterial 40

APPENDIX B—THE RULES OF LAW WITH REGARD TO THE CONTRACTS OF COMMON CARRIERS AND THE PROVISIONS OF THE HARTER ACT DO NOT PREVENT THE CLAIMANT RETAINING THE FREIGHT PAID IN ADVANCE . . 44-51

APPENDIX C—UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, THE MALCOLM BAXTER, JR. 52-57

INDEX OF CASES CITED.

PAGE

Admiralty Shipping Co. v. Weidner, 114 L. T. R., 171 23
Allanwilde, The, 247 Fed., 236.....3, 4, 5, 17, 29
Am. & Eng. Enc. of Law, Vol. 7, p. 246 (2d Ed) 15, 34
American Union Tel. Co. v. Union Pac. R. Co., 1 McCrary, 188 24
Appam, The, 243 Fed., 230.....14, 38

Birch & Co. v. The City of Orange..... 7
Bird of Paradise, 5 Wall., 545..... 40
Blowers v. One Wire Rope Cable, 19 Fed., 444 42
Brusgaard v. Acosta y Cia..... 6
Burn Line v. U. S. & Australasia S. S. Co., 162 Fed., 298 (C. C. A., 2d. Cir.).....14, 36

Calderon v. Atlas S. S. Co., 170 U. S., 272.... 49
Caledonia, The, 157 U. S., 124..... 48
Carib Prince, The, 170 U. S., 655..... 48
Carver on Carriage by Sea (6th Ed.) Sec. 269 42
Cau v. Texas & Pac. R. Co., 194 U. S., 427.... 45
Christie v. Davis Coal & C. Co., 95 Fed., 837; S. C., 110 Fed., 1006 15
Civil Service Co-op. Soc. v. General Steam Nav. Co., 20 T. L. R., 10; 2 K. B., 764.... 23
Coker, A. & Co. v. Limerick S. S. Co., House of Lords, 118 L. T., 726.....12, 13
Cunard S. S. Co. v. Kelley, 115 Fed., 678.... 47
Cargo ex Galam, 2 Moore's Privy Council Reports (N. S.), 216..... 28

PAGE

De Silvale v. Kendall, 4 M. & S., 37..... 33

Fortuna, The, Edwards, 56..... 28

George N. Pierce Co. v. Wells Fargo & Co., 236 U. S., 278 50
Gracie D. Chambers, The, Calendar No. 479 .....3, 4, 11, 12
Great Indian Ry. Co. v. Turnbull, 53 T. L. R., 325 16

Harter Act, The 30, 31, 44-51
Henry B. Hyde, The, 90 Fed., 114..... 47
Horlock v. Beal, 114 T. L. R., 193..... 21

Irrawaddy, The, 171 U. S., 187..... 46

Jason, The, 225 U. S., 32..... 47

Kelly v. Johnson, 3 Wash., C. C., 45..... 16
Kensington, The, 183 U. S., 263..... 49
Kimball, The, 3 Wall., 37..... 20

Lexington, The (New Jersey Steam Nav. Co. v. Merchants Bank), 6 How., 344..... 44
Lines v. Atlantic Trans. Co., 223 Fed., 624.... 49
Lloyd Royal Belge v. Stathatos, 33 T. L. R., 390 21

Malcolm Baxter, Jr., The.....6, 26, 51-57
Montana, The, 129 U. S., 397..... 45

National Steam Nav. Co. v. International Paper Co., 241 Fed., 861 (C. C. A., 2d Cir.) 14, 38, 41
N. Y. C. R. Co. v. Lockwood, 17 Wall., 357... 45
Nyholm, Ex Parte, 29 T. L. R., 634..... 17

PAGE

Ogden v. N. Y. Mutual Ins. Co., 35 N. Y., 418 20

Parsons The Law of Shipping 2nd 214,14

Pacific Coast Co. v. Reynolds, 114 Fed., 877 (C. C. A., 9th Cir.) 14, 35

Pearce v. The Thomas Newton, 41 Fed., 106.. 41

Portland Flouring Mills v. British & Foreign Marine Ins. Co., 130 Fed., 860 (C. C. A., 9th Cir.) 14, 33, 34

Queensmore, The, 51 Fed., 250; 53 Fed., 1022 (C. C. A., 4th Cir.) 14, 34

Rumball v. Puig, 34 Fed., 665..... 28

Saturnus, The, 250 Fed., 407 (C. C. A., 2d Cir.) 41

Snow v. 350 tons of Mahogany, 46 Fed., 129.. 28

Spring Co. v. Knowlton, 103 U. S., 49..... 23

Standard Varnish Works v. S. S. Africanic.. 5, 6

Standard Varnish Works v. S. S. Magda..... 6

Tornado, The, 108 U. S., 342..... 16

Toronto, The, 174 Fed., 632..... 47

Watson v. Duykinck, 3 Johns. Rep., 335..... 18

York Mfg. Co. v. Railroad Co., 3 Wall., 107.. 44

Supreme Court of the United States

STANDARD VARNISH WORKS, Libelant-Appellant, against S. S. *Bris*, REDERIAKTIEBOLAGET BORE, Claimant-Appellee.	October Term 1918. No. 745.

BRIEF FOR CLAIMANT-APPELLEE.

Statement.

This case comes before the Court on a certificate from the Circuit Court of Appeals for the Second Circuit. The appellee has asked to have the entire record certified up. This is an advance freight case similar in some respects to the *Gracie D. Chambers*, No. 479 on the calendar of this Court, and the *Allanwilde*, No. 449, but differs in the following particulars:

1. The freight retention clause here is more specific in giving the right to retain.

2. The cargo failed to go forward, not because of the inability of the ship, but because the shipper failed to procure an export license.

Varnish was consigned by libelant to Allmanna Svenska Elektriska A. B. Westeras (the German-Swedish Electrical Company) at Gothenburg, Sweden. Libelant paid freight and received in exchange therefor a bill of lading which contained amongst others, the following provision:

"6. * * * prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost * * *."

At the time of said shipment, shippers were required to obtain export licenses from the British Government on cargo of this class and from the United States on such cargo as the President should, by proclamation, designate. The President's proclamation at that time included some articles, but not varnish. The libelant, the shipper, on shipment presented a British license. Before the vessel sailed the President included varnish, by proclamation effective August 30, 1917. The shipper thereupon applied for a United States license. It took more than a month for the Government to decide whether to grant the license or not, but on or about October 8, the license was refused and the shipowner unloaded the varnish and returned it to the shipper, at the same time holding itself ready and willing to carry said cargo forward if a license therefor were obtained by the shipper. The question certified was as follows:

"Did the bill of lading contract justify the carrier under the facts stated in refusing to refund the prepaid freight?"

FIRST POINT.

General considerations governing the construction of prepaid freight retention clauses.

1. The Chambers and Allanwilde cases were exceptional. The goods did not go forward because of a prohibition against the vessel.

The maritime world was surprised by the decision in the *Allanwilde* and the decision in the *Gracie D. Chambers*, in the Southern District, an opposite result being reached in the Eastern District. As Judge Ward said, in the opinion in the *Gracie D. Chambers* case in the Circuit Court of Appeals, the clause that prepaid freight shall not be returned "ship lost or not lost" has "been introduced into bills of lading and charter-parties from time out of mind," and we submit that Judge Ward's next sentence is equally true, "The clause, variously phrased, is intended to cover all contingencies."

If a term is to be implied that the vessel must break ground, to enable the owner to retain freight, unless the clause specifically shows the intention of the parties by stating that the freight is to be deemed earned on shipment and retained, we submit that business traditions will be seriously upset.

It is the delivery, not the breaking ground, which is important. When a voyage is broken up at any stage before the cargo is *delivered*, somebody must suffer loss. If no clause is inserted which allows the shipowner to retain the freight paid up to that time, he will have used his vessel for such period without obtaining any compensation therefor. The provision that freight paid in advance may be retained, is a rough and ready rule which allows the *status quo* to remain when car-

riage of cargo is prevented without fault of the carrier. The freight paid in advance will probably never exactly compensate for the services performed up to that time, but it does so approximately.

The *Allanwilde* and the *Chambers* cases were extreme cases. The voyage was broken up because of a defect in the ship, which was not allowed by the authorities to make the voyage, because it was a sailing vessel. The surrounding circumstances were extreme. In the *Chambers* case the freight was actually paid after the prohibition went into effect, and in both cases the vessel was only engaged a short time on the service and was returned to the owners, with an opportunity to earn fresh freight. Judge Rellstab stated that he decided the *Allanwilde* on equitable grounds, and in the course of his opinion said (247 Fed., 236, at 238):

"Not only would the shipper be denied the benefits which it would have derived, had the shipowner carried out the charter party, but it would also have to pay for services agreed to be performed by the shipowner, but not rendered; while the shipowner would, in addition to retaining the unearned freight money, have the commercial use of its vessel during the very period it was chartered for the shipper's use. The embargo in such a case, instead of being a detriment, would be a decided benefit—a veritable windfall—for the shipowner. So inequitable would this result be that a court controlled by equitable principles should not be a party to its consummation, unless constrained by strict law."

In fact, these two cases were exceptional. During the war so many restrictions have gone into effect that the period of loading, which previously was a period when the voyage was not often interrupted, became one of almost unbelievable difficul-

ties and delays. Prior to the war freight was often collected at destination. During the war it has been almost impossible to find an instance where the shipowner has not insisted that freight be prepaid and retained, for the very purpose of covering the shipowner against losses arising from such delays. Almost all of the delays, however, have arisen in connection with the licensing of cargo and they have not been accompanied by profit to the shipowner.

When an appeal was taken in the case at bar to the Circuit Court of Appeals for the Second Circuit, that Court had recently held that freight need not be returned, and thus Judge Rellstab's decision in the *Allanwilde*, which had been certified up by the Third Circuit, remained the only decision breaking the harmony of the law. The appellee, nevertheless, joined in the petition to the Circuit Court of Appeals that the question in the case at bar be certified to this Court, believing that it is important that it should have before it another form of the freight retention clause, and that it should have distinctly presented an example of the many cases where the cargo has not gone forward because of the failure of the shipper to perform his part of the contract, and obtain a license.

2. Examples of cases where the goods did not go forward because the exporter failed to procure a license.

The following cases are at issue, in the United States District Court for the Southern District of New York, in which the appellee's proctors are attorneys of record:

Standard Varnish Works against the Steamship Africanic. In this case, in which the same libelant is involved, the steamer finished loading July 12,

1917. She was held up at first because of the failure of shippers of pig iron and other goods in the bottom of the hold to procure a license, which was called for by the President's proclamation issued after the entire cargo had been loaded. Subsequently all of the cargo became involved, and the libelant failed to procure a license for its cargo. The United States authorities did not decide until October whether licenses would be issued to shippers and the vessel was therefore detained for over three months—a very much longer period than it would have taken to make the entire voyage under ordinary circumstances.

Standard Varnish Works against Steamship Magda. This is a case in which the same appellant is involved, and the facts are almost identical with the facts in the case at bar, except that a fire broke out and damaged part of the cargo while the steamship was lying in the stream waiting for a decision whether licenses would be granted to shippers.

Brusgaard against Acosta y Cia. In this case the sailing vessel *Clyde* was chartered to carry coal from Norfolk, Virginia, to Buenos Aires, Argentine Republic. The charterer obtained the necessary license from the United States Government, but the license expired on October 4, 1917, when the vessel needed about two hours more to complete her cargo. When the charterer made a new application, the Government held up the granting of it and did not decide until three months later, January 2, 1918, to refuse it, on the ground that the consignee had some German affiliations.

The Malcolm Baxter, Jr. In this case a permit had to be obtained from the Netherlands Overseas Trust. The vessel was loaded February 8, and the vessel detained, idle in port, nearly two months, until on or about March 29th, when the shipper

definitely learned that the permit could not be obtained. This case has been decided and the opinion is annexed hereto as Appendix C. It will be reviewed in the fourth point at page 26.

3. One example where the license of the vessel was withdrawn.

Birch & Company et al. against Schooner City of Orange. The proctors for the appellee represent cases involving several millions of dollars of freights. Amongst these there is one case only where the difficulty arises with the vessel, the case of the *City of Orange*. This was a sailing vessel where the United States authorities made an exception, granting a special license to proceed through the war zone. When the cargo was almost completely loaded on May 1, 1918, the license was revoked. Negotiations to reinstate it continued two months, until on or about July 6, when hope was abandoned and unloading began, being completed on July 14. If the license had not been revoked, the cargo in ordinary course would have been discharged at its destination in Genoa at an earlier date, on or about June 24, 1918.

4. Risks run by shipowners in connection with war licenses.

In the case at bar the allegations of the answer were admitted correct in open court, for the purposes of the suit, and judgment was thereupon entered, dismissing the libel (Record, fols. 86, 87). The tenth article of the answer was as follows (fol. 23):

"TENTH: At all times during the year 1917, Great Britain and her Allies enforced various regulations against exporters of cargo, requiring information from them which was peculiarly within the knowledge of such exporters, and stopping car-

goes if their character or destination was objectionable; or if, for some other reason, said Great Britain and her Allies did not wish the cargo to be carried."

The seventeenth article of the answer stated the details which the United States Government required to be disclosed as to the goods, the consignor, consignee, etc., to protect itself from having goods taken to Germany (fol. 28). It will be seen that the carrier, during the war period, ran huge risks, particularly as regards cargo licenses. The facts regarding the cargo and the suitability of the consignee were peculiarly within the knowledge of the shipper. The carrier might load a cargo and be ready to sail, when the Government would discover that some of it was objectionable, and the carrier would be ordered to unload it. That this has occurred time and time again is common knowledge. When the Government became suspicious, the delay was, almost invariably, very great. While the Government was making up its mind whether a license should be granted or not, the carrier could not unload his cargo and employ the vessel in other ways. Even where the difficulty was with the vessel, the same governmental delays were usually experienced, as appears from the reference to the *City of Orange*, above. The *Allanwilde* and the *Chambers* were exceptional cases, because of the fact that the action of the Government was comparatively quick and definite.

5. The shipowner's obligation under the bill of lading.

The proctor for the appellant has argued that, if freight can be retained when the ship has not broken ground, the shipowner will give no consideration therefor (Fourth Point, at p. 12); that

the consideration would be so small that the contract would be contrary to the policy of the United States (Eleventh Point, pp. 19-22) and contrary to the Harter Act (Twelfth Point, pp. 22-26). Let us consider the bill of lading. When the carrier issued it, he agreed to carry each parcel of goods to destination, unless he was prevented from doing so by some act for which he was not responsible. This might be a governmental prohibition against the ship, but, more probably, would be a prohibition against the cargo. When he had the vessel entirely loaded, he might be told that some particular article near the bottom of the ship could not be carried, and he would have to unload a large part of the cargo to remove it. The freight on that particular cargo might be, and in practice often has been, absolutely inadequate to compensate the carrier for the expense involved. Above all, wherever there was difficulty in regard to licenses, there was terrific delay. The freight was given to the carrier in consideration of his promise to carry out his duty to the goods. There can be no question in the case at bar that the carrier carried out this full duty and actually used up more time of the ship than would have been used had the voyage been made in ordinary course. When the carrier has performed his full duty in regard to the goods, which is all that the contract called for, can there be any ground for claiming that consideration has not been given, or that retention of freight will be contrary to public policy?

The consideration which the carrier gives is the promise to perform its full duty to the goods, whatever that duty may be. In some cases, like the *Allanwilde* and the *Chambers*, it may be that the carrier's performance turns out to be somewhat less than was expected, but in many others, as in the illustrations given above, the governmental inter-

ference before the steamship broke ground entailed the performance of greater obligations on the part of the carrier than was anticipated.

To state the situation colloquially, the carrier says to the shipper: "You must pay me a certain sum in advance and in return I will perform my full duty in trying to get your goods to destination. That is what you pay me for. If you find difficulty in obtaining the license, the bill of lading will bind me to keep my vessel waiting idle a reasonable time. If, for some cause beyond my control, the carriage becomes impossible, and particularly if it becomes impossible because you fail to procure the export license, this must not alter the situation."

6. War clauses.

The following war clauses show clearly the difficulties which the shipowner anticipated. Particular attention is called to the second clause, which refers to "detention or interference of any sort by any power."

"7. ALSO, in case the ship shall be prevented from reaching her destination by * * * war, * * * or the hostile act of any power, * * * or if the discharging of the goods or any part thereof should be objected to by the authorities, the master or owners may * * * discharge the goods into any depot or at any convenient port or bring her cargo back to port of shipment, where the ship's responsibility shall cease. * * * In any case the freight and charges are to be paid in full and the shippers and consignees to be responsible for all expenses thereby incurred upon the goods and for demurrage and extra expenses of the vessel to be paid in full along with the freight." * * *

"Owing to conditions of war or hostilities existing or threatened, this shipment is accepted at the sole risk of the owners hereof of arrest, restraint, capture, seizure, detention or interference of any

sort, by any Power; and the carrier and its representatives are privileged in its or their absolute discretion, if deemed advisable for the protection of the vessel or any cargo or to avoid loss, damage, delay, expense or other disadvantages or danger, either with or without proceeding to or toward the port of discharge or entering or attempting to enter or discharge the goods there, and whether such entry or discharge be permitted or not, to proceed to any other port or ports or return to the port of shipment, once or oftener in any order or rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at any such port or ports at the first or any subsequent call, and full bill of lading freight, together with extra compensation for additional transportation and all other charges shall be paid by the shipper, consignee and or assigns and shall be a lien on the goods." (Answer paragraphs 8 and 9; Record, pp. 7 and 8.)

SECOND POINT.

The shipper cannot recover the freight which he has paid because the contract between the parties authorizes its retention.

1. The leading authorities in the United States and England.

With the exception of the decision of Judge Rellstab in the *Allanwilde*, all the authorities in this country and England hold that, where there is a freight retention clause in the bill of lading, the carrier can retain the freight, though the goods are not carried because of restraint of Princes. The leading case in this country is *International Paper Company* v. *Schooner Gracie D. Chambers*, decided by the Circuit Court of Appeals for the Second Cir-

cuit, No. 479 on the calendar of this Court. The leading case in England is *A. Coker & Co.* v. *Limerick S. S. Company, Ltd.* (House of Lords, 118 L. T., 726). With the exception of this Court no higher authorities can be cited than the Circuit Court of Appeals for the Second Circuit and the House of Lords.

International Paper Company v. *Schooner Gracie D. Chambers* (C. C. A., 2d Circuit, decided May, 1918, not yet reported). This case has already been referred to, one where the goods were not carried because of a prohibition against the vessel. The retention clause was as follows:

"Freight for the said goods to be prepaid in full without discount retained and irrevocably ship and or cargo lost or not lost."

The Court in its opinion said:

"By our law freight is earned only upon delivery of cargo. The ship may have carried the cargo on a voyage of 3,000 miles and to within one mile of destination, but the carrier has earned no freight and must return any freight prepaid if he has not delivered. The parties, of course, may agree upon a different rule, and for that purpose a clause has been introduced into bills of lading and charter-parties from time out of mind that prepaid freight shall not be returned 'ship lost or not lost.' The clause variously phrased is intended to cover all contingencies. If only the loss of the ship were contemplated the additional words 'or not lost' would be meaningless. What the parties intend is that the carrier shall keep the freight even if he does not deliver the cargo, unless the failure to deliver be due to the carrier's fault or to a peril not excepted in the bill of lading or charter party." * * *

"It is to be remembered that goods delivered to the carrier even before actual loading aboard are in his custody, and that the maritime engagement

is begun, the goods being bound to the ship for the freight and the ship bound to the goods for transportation in accordance with the contract (*Bulkley* v. *Naumkeag Co.*, 24 How., 386; *Scott* v. *The Ira Chaffee*, 2 Fed. Rep., 401). The money sought to be recovered in this case was paid as freight against delivery of the bill of lading, whether earned or not.

"The apparently inequitable result in this case is a temptation to interfere in a contract made by parties perfectly competent to contract and contracting in the face of the very emergency which subsequently arose. This is to be especially avoided in construing familiar and long established provisions in commercial documents."

A. Coker & Company v. *Limerick S. S. Company* (House of Lords, 118 L. T., 726). In the *Coker* case the vessel caught fire and sank at her pier before the vessel broke ground, and the voyage was never performed. The House of Lords held that the freight which had been paid might be retained. Opinions were delivered by Lord Parker, Lord Atkinson and Lord Parmoor, two other Lords concurring with the language used by Lord Parker, who said (p. 728):

"Inasmuch as freight is not as a general rule payable until it is earned, the freight under these provisions would not be payable whether at the rate of 225s. per ton delivered, or at the alternative rate of 225s. dead weight capacity unless and until the vessel had arrived at its port of destination and delivered the cargo. This event never happened, the vessel having sunk in dock before sailing. It is, however, quite a common thing for a charter-party to provide for advance payment in respect of freight, and advance freight, once it becomes due, may be recovered, notwithstanding it is never in fact earned. In the present charter-party there is a clause in the following words: 'The freight to be payable on signing bills of lading less 3 per cent. in Liverpool in cash before sailing.'"

Lord Parker proceeded to hold that the freight was due and could be retained. Lord Atkinson in the course of his opinion said (p. 727):

"It was admitted, it could not, upon the authorities, be successfully disputed, that, if the advanced freight became payable under the terms of the charter-party, the subsequent loss of the cargo could not affect the owners' right to that freight."

In the course of the opinion of the Court, which was unanimous, there was not a suggestion that the fact that the vessel had not broken ground made the slightest difference. As Lord Parker said, except for the agreement of the parties, freight would not have been earned until delivery, but their agreement that the freight should be paid in advance was unquestionably binding.

2. Other authorities for the appellee.

Other authorities to the same effect as those above quoted for the appellee are as follows:

Portland Flouring Mills v. *British & Foreign Marine Insurance Company,* 130 Fed., 860 (C. C. A., 9th Cir.), certiorari denied, 195 U. S., 629.

Pacific Coast Company v. *Reynolds,* 114 Fed., 877 (C. C. A., 9th Cir.).

The Queensmore, 53 Fed., 1022 (C. C. A., 4th Cir.).

Burn Line v. *United States & Australasia Steamship Company,* 162 Fed., 298 (C. C. A., 2nd Cir.).

The Appam, 243 Fed., 230.

National Steam Navigation Company Ltd. v. *International Paper Company,* 241 Fed., 861 (C. C. A. 2nd Cir.).

Parsons, The Law of Shipping 2 10
2 14.

In 7 *Am. & En. Enc. of Law*, 2nd Ed., page 246, it it said:

"It is competent for the parties to a contract of affreightment to stipulate expressly that the freight, or a part thereof, shall be payable absolutely *at the time of the shipment of the cargo*, or at a certain time thereafter, without regard to the performance of the contract." (Italics ours.)

This was quoted with approval by the Circuit Court of Appeals in *Portland Flouring Mills* v. *British & Foreign Marine Insurance Co., supra.*

In view of the unanimity of the authorities, it has not been thought necessary to do more than cite some of them. They, and other authorities on the same point, showing that the fact that the *Bris* did not break ground is immaterial, are, however, summarized for the convenience of the Court, in Appendix A, page 33 of this brief.

3. Cases of appellant said to be in conflict with the foregoing authorities.

The appellant cites various authorities on the general proposition that a freight retention clause, if applied in a case where the vessel has not broken ground, would be in conflict with the Harter Act, and with those cases which will not allow a charterer to completely exempt itself from the consequences of its negligent acts. These will be considered elsewhere. The only freight retention cases which are said to be in conflict are referred to in the third article of appellant's brief, pages 9 to 10 inclusive.

(a) *American authorities cited by appellant.*

Christie v. *Davis Coal & Coke Company.* That case, by way of *dictum*, held that freight is payable

only on delivery of cargo unless the parties contract otherwise. In that case part of the cargo was jettisoned and never delivered, but since the parties had contracted that freight should be paid on the intake weight the Court held that the shipper was bound by the contract, and that freight might be retained on the cargo jettisoned. The case therefore agrees with our contention. Though the cargo was not delivered the shipowner had performed his full duty.

The Tornado. In this case fire rendered the ship unseaworthy, so as to be unable to proceed, while the cargo was being loaded. No freight was paid at the time. The question involved was the right to transship the cargo and the carrier's lien upon it, the carrier claiming that he had been wrongfully deprived of his right to transship and to earn the freight. The case is not authority against the shipowner, for the shipowner in the case at bar admits that no freight can be recovered unless the contract provides that freight paid may be retained.

Kelly v. *Johnson.* This is another case where there was no freight paid and no bill of lading given. We do not claim under such circumstances that the carrier has any right to sue for all or even part of the freight.

(b) *English authorities cited by appellant.*

Great Indian Railway Co. v. *Turnbull.* In that case four-fifths of the freight was to be paid one month after sailing, which was done. The cargo was lost by the negligence of the ship and the owner of the cargo subsequently sued to recover damages caused by such negligence. Recovery was granted, and, in estimating the value of the goods and the loss of the shipper, the amount paid for freight was included. There is nothing in this decision which

is contrary to our contention that freight paid in advance should be retained where the cargo does not go forward for a cause for which the carrier is not responsible.

Ex Parte Nyholm. In that case a vessel refused to perform a voyage because of the charterer's bankruptcy. No freight had been paid. It was held that when the ship refused to perform it could not recover freight, which was certainly a correct decision. There was no question of recovering back freight paid in advance, which is the question in the case at bar.

It will be seen, therefore, that these authorities do not in any way conflict with the authorities cited for appellee.

4. The language of the freight retention clause in the case at bar leaves no room for implication.

In *The Allanwilde*, Judge Rellstab did not dispute the right of the parties to contract that freight should be paid on shipment and retained if the language of the contract was clear, but he held that in that case the right to retain "irrevocably" was only intended to arise when the vessel had well started on her voyage. He said, at page 238:

"The clause, 'freight earned retained and irrevocable, vessel lost or not lost,' cannot mean that prepaid freight is earned the moment it is paid, regardless of any forwarding of the cargo."

In the case at bar there can be no question that the clause does mean exactly that "prepaid freight is earned at the moment it is paid," for the clause says that it is earned on shipment, at which time the freight was prepaid, and both the libel and the statement in the certified question addressed to this Court state that the cargo was shipped. We have,

therefore, the admitted fact that the goods were shipped and the express agreement that the freight is earned on shipment and is to be retained by the shipowner. There is no room for any implication to the contrary. The meaning of the clause is clear.

5. Chancellor Kent's case on the validity of an agreement that freight may be earned on shipment.

The provision in a contract of affreightment to the effect that the freight is to be considered earned on shipment, is of ancient origin and *has always been enforced by our courts.* The leading authority dates far back to the year 1808, *Watson* v. *Duykinck*, 3 Johns Rep., 335 (N. Y.). In that case, Duykinck had agreed with Watson, who was the master of the sloop *Harriet*, that "in consideration of $100 to be paid immediately, he (the master) would suffer the plaintiff (Duykinck) to proceed in the sloop as a passenger on the voyage and to load on board for transportation merchandise to the value of $600," and that he (the master) would provide Duykinck with food, etc., during the voyage. The ship sailed, but two days after sailing sprang a leak and became a total loss. The plaintiff's goods were redelivered to him at the loading port. The plaintiff was not provided with another vessel, and the $100 paid in advance by him was not returned. He accordingly brought suit to recover the freight paid in advance on the ground that the consideration for which this freight had been paid had failed.

In holding that the plaintiff was not entitled to recover, Chancellor KENT, who delivered the judgment of the Court, says:

"The parties agreed that in consideration of $100, to be paid immediately, the one would suffer the

other to proceed and go in the sloop, as a passenger, on the voyage, and to load on board, for transportation, merchandise to the value of $600, and that he would also maintain him as a passenger during the voyage. The other party assented and paid the money, and put the goods on board, and proceeded with them as a passenger, until the disaster took place. This agreement did not go the length required by the French law of stipulating that the money should at all events be retained, but it was still particularly confined to the permission to be received on board as a passenger, and to load the goods on board. Both these parts of the agreement were literally complied with. This can easily be distinguished from an agreement to transport and deliver at the place of destination. In the one case, the master places his compensation upon the actual carriage and delivery of the goods. The safe arrival of the subject is a condition precedent to the payment. In the other case, *the consideration is rendered by receiving the goods on board, and making all due and bona fide efforts to carry and deliver them.* I think this latter is, upon the whole, the better construction of the agreement before us, especially as the practice of retaining the advance freight, in all such cases, must have been known to the parties, from the usage which has been found by the jury, and as the distinction between an agreement to receive on board, and an agreement to transport and deliver, *is not a new refinement, but can be traced back to the text of the civil law.* The doctrine is recognized and adopted by various authors, that if the agreement be to pay freight for the loading of the article on board, the freight is due, though the article perish in the course of the voyage. This is the language of the civil law.

Gothofredus, in his notes on the Digest (Lex Rhodia de Jactu., 14, 2, 10), states the distinction in more clear and explicit terms: *Conduxisti vehenda mancipia; mancipium unum in nari mortuum est; quaeritur, num rectura debeatur? Si de mancipiis vehendis inita conventio est, non debetur: si de mancipiis tantum nari imponendis debetur.*

Molloy (bk. 2, ch. 4, sec. 8) and Abbott (p. 225) seem to have followed the same authorities, but

without taking any discrimination between the cases where the money was and where it was not actually advanced beforehand. Perhaps no such discrimination is to be made, though I think the case of the money actually advanced is the stronger case, *as forming superior evidence of the intention of the parties that the freight received should, in every event, belong to the master.*

We conclude, upon the whole view of this case, that Watson, the plaintiff in error, was entitled to retain the freight money, and, consequently, that the judgment below ought to be reversed." (Italics ours.)

This case has been cited with approval by this Court in *The Kimball*, 3 Wall., 37, and by the New York Court of Appeals in *Ogden* v. *N. Y. Mut. Ins. Co.*, 35 N. Y., 418, at 420.

6. The effect of the war clauses.

It is also clear in the case at bar that the war clauses quoted above, page 10, give the right to retain the freight, and this was also held by Judge Knox in the District Court. It would, however, be unfortunate if the case should not be decided in the appellee's favor on the broad ground. There can be no question but that all these retention of freight clauses, providing for prepayment of the freight and its retention, were intended to justify the carrier in refusing to return it, when the carriage of the cargo was prevented by causes beyond his control.

THIRD POINT.

The appellant's contention that the contract became illegal or dissolved by the act of the Goverment, and that consequently the shipper can recover the freight, is unsound.

The appellant claims that the contract became illegal or dissolved by the Government (Brief, pp. 3, 4). Were this true, the freight could not be recovered. In the cases which appellant cites, the consideration already paid was retained (Brief, pp. 4 to 7). It was merely held in these cases that future payments could not be recovered.

In *Horlock* v. *Beal*, sailors were interned in Germany at the outbreak of the war. They were allowed to retain the wages which they had received, but were not allowed to recover future wages after it was determined that the internment would be permanent.

In connection with *Horlock* v. *Beal* the case of *Lloyd Royal Belge* v. *Stathatos*, 33 T. L. R., 390; affirmed 34 T. L. R., 70, is usually cited. There a Greek steamer, then at Gibraltar, had been chartered by the Lloyd Royal Belge as from November 30, 1916, for a voyage to New York and back to a French Atlantic port. The charter was on the usual time-charter terms, and the hire was to be paid monthly in advance. On December 2nd the steamer was detained by the authorities at Gibraltar by reason of a general decision to detain Greek ships, arrived at by the British Government in consequence of a situation that had arisen at the time between the Allied powers and the Greek Government. This detention lasted until February 10th. The charterers brought an action

to have it declared that the charter-party had been put an end to, and also to recover the month's hire paid in advance. It was held by Mr. Justice Atkin that the charter-party had been put an end to by the detention, which commenced one day after the date on which the charter was signed, but that this fact did not give the charterers the right to recover back the hire. With regard to the right to have the hire repaid, Mr. Justice Atkin says:

"Now it is decided that where a contract becomes dissolved by reason of the operation of the implied condition in cases *de certo corpore*, or of personal service, the parties are left *rebus sic stantibus* with no right to recover in respect of performance made or partly made before the dissolution, whether by way of payment, or of services rendered, or work done, provided that no right of action had accrued under the contract before the dissolution. Thus the plaintiff was not entitled to recover for machinery partly completed and fixed in a building burnt down—*Appleby* v. *Myers* (1867), L. R. 2, C. P., 651; for price paid on account of machinery completed for a ship which was lost before delivery of machinery (*Anglo-Egyptian Company* v. *Rennie* (1875), L. R., 10 C. P., 271); for premiums paid under an apprenticeship deed where the apprentice died (*Whincup* v. *Hughes* (1871), L. R., 6 C. P., 78), or for money paid for a flat to view the Coronation procession where the procession did not take place (*Krell* v. *Henry*, 19 *The Times* L. R., 711; (1903), 2 K. B., 740). I think the language of Lord Halsbury presiding in the Court of Appeal in the case of *Civil Service Cooperative Society* v. *General Steam Navigation Company*, 20 *The Times* L. R., 10; (1903), 2 K. B., at p. 764, approving of the judgment of Mr. Justice Channel is apposite."

Continuing his opinion, Mr. Justice Atkin says:

"It would appear, therefore, that upon the dissolution of this contract, the plaintiffs were not entitled to recover back the monthly hire which they had paid in advance." (33 T. L. R., at 392.)

Civil Service Cooperative Society v. *General Steam Navigation Company*, L. R. (1903), 2 K. B., 756. There a steamer had been hired for the purpose of seeing the naval review at the King's coronation. All of the hire, amounting to £1,500, was paid in advance. Owing to the King's illness, the review did not take place. The charterer accordingly wished to recover back the £1,500. Lord Halsbury says, at page 764:

"All that can be said is that when the procession was abandoned the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment."

In *Admiralty Shipping Company* v. *Weidner* (Appellant's Brief, p. 5), the hire, which had been paid in advance, was allowed to remain in the hands of the shipowner.

Counsel for appellant, on page 7 of their brief, cited *Cross & Empire Spring Company* v. *Knowlton* for the same proposition. In that case a corporation had passed a resolution to increase its capital stock. This resolution was illegal and void *ab initio* by the laws of New York under which the corporation was incorporated. One of the stockholders made payment on account of the stock which was to be issued to him. The stock was never issued by the corporation, and the resolution authorizing the issue was rescinded. The corporation, however, refused to repay the money paid by the stockholder. It was held that this money could be recovered.

Clearly, that case was entirely different from the case at bar, since there the contract was illegal from its inception. There was no part performance, while performance was perfectly legal.

In the *American Union Tel. Company* v. *Union Pacific Railroad Company*, cited by counsel on the same page of the brief, the Union Pacific Railroad Company sold telegraph lines, the sale being *ultra vires*. It was held that the railroad could not take back these lines without returning the consideration that they had received for them. This again is a case of a contract illegal from its inception and not in point.

The effect of the proclamation of the President, however, was not to make the contract illegal. The proclamation merely required permits to be obtained. There was nothing illegal about it. The shipper did not obtain a permit—that was all. The appellant states in the brief, page 3:

"It never was at any time possible to obtain a license for the shipment of the goods in question after the Government refused to allow their export to Sweden without a license."

This allegation is beyond the record. If it is intended to refer to the appellant's inability to obtain a license for its own particular shipment, it may be true, but in fact other shippers, before the war ended, did subsequently procure licenses for the shipment of their goods.

FOURTH POINT.

The libelant cannot recover the freight which he has paid to the steamship owner, who has always been ready to perform, since the goods were not carried forward because of the shipper's own failure to procure a license.

1. The shipper's knowledge that licenses must be obtained.

The appellant says (Brief, p. 2):

"Much stress was laid in the District Court upon the proposition that the failure to make the voyage and transport the goods was due to the failure of the shipper to obtain a license. But this was not a condition precedent when the contract was made (fols. 33, 64), and it was through no fault of the shipper that its application for a license when it became necessary was denied. The failure to get it was merely an incident arising out of Governmental action taken *after* the making of the contract."

Let us examine the facts: The shipper knew when the contract was made that the British Government required shippers to procure licenses, and that it had procured one. It knew that the United States laws required shippers to obtain licenses for such articles as were mentioned in the President's proclamation, and that some articles had been mentioned by a proclamation in July. It must have known, therefore, that its own goods might at any time be covered by a proclamation of the President, and that it would be obliged to get a license to enable the goods to go forward if such proclamation were made, and that if it did not obtain such a license the carrier would be obliged to wait a reasonable time to find out whether such

licenses could or could not be obtained. This was a risk which the shipper ran. With all these facts in mind, or accessible to him, he made a contract agreeing that the freight should be paid in advance and retained.

2. Authorities on the exporter's duty to procure the license.

Judge Knox, in deciding the case at bar in favor of the shipowner, said (Record, pp. 26, 27, fols. 77, 78, 80):

"At the time the parties here entered into their contract, they, and the world, knew the hazard with which shipping was being carried on. They likewise knew that what was permitted upon one day might not be permitted the next. Indeed, by Act of Congress, and Presidential proclamation, they were notified that regulations governing, and perhaps forbidding, exports were likely to be issued at any time, and in the face of this knowledge the libellant delivered his cargo to the *Bris* and prepaid the freight as against the bill of lading. It is not to be wondered at, therefore, that ship's owners, in view of the demand for cargo space, sought to protect themselves (if lawfully they might do so) as against any contingency that might arise.

The infirmity here, unlike the *Gracie D. Chambers* case, was in the cargo of the libellant and not in the *Bris*.

* * * the libellant did not perform the conditions precedent to his being permitted to forward his goods, and it appears to me that the burden of not having done so, even though prevention was through the action of the Government, must fall upon it."

The Malcolm Baxter, Jr. Reference has already been made to this case, decided on October 15, 1918, in the Southern District of New York, and not yet reported, annexed hereto as Appendix C, page 52.

In this case a sailing vessel was chartered to carry oil meal from New York to Rotterdam, the charter providing that the shipper should obtain a permit from the Netherlands Overseas Trust. The shipper received a cable on February 3, 1917, that such a permit had been given, but this cable was false in fact, and it was not until on or about March 29, 1917, almost two months later, that the shipper learned that the permit could not be obtained, and accordingly took redelivery of the cargo and sued to recover the freight. The case was decided by Judge Learned Hand, who, while sitting in the Circuit Court of Appeals, dissented in the *Chambers* case. It is interesting to notice that Judge Hand, like Judge Knox, felt that the cargo license cases, where the shipper failed to carry out his part of the contract in procuring a license, though perhaps without any fault on his part, were very much stronger than the cases where the default lay with the ship. Judge Hand held that, irrespective of the freight retention clause, the shipper could not recover freight because of his failure to procure a license and said (p. 56, *post*):

"Hence from every view it seems to me clear that the consignment presupposed a preliminary permit, and this the libellant never procured. Performance of that covenant was a condition precedent to performance by the owners, who were not obliged to carry any cargo other than that described. Thus they are not in default, and the rule in the *Gracie D. Chambers* applies. Indeed, since the default was the cause of the frustration of the voyage, it is not necessary to invoke the rule in that case, for if the charterer defaults in his covenants, he is in no event in a position to recover."

The Fortuna, Edwards, 56. The circumstances in the case at bar are peculiar and it is difficult to find a precise analogy in the reports. The settled rule, however, laid down in the prize courts with regard to enemy property on neutral ships is in point and in favor of the claimant. It is there held that when a neutral ship is taken into port and enemy property thereon confiscated, freight must be paid because the voyage has been broken up, not by any incapacity on the part of the ship, but purely because of the fault of the cargo. The rule is clearly stated by Sir William Scott (afterwards Lord Stowell) in the case of *The Fortuna*. It is there said:

"But the first inquiry is, whether the owner would have been entitled to freight. He could have no right but upon an entire execution of the contract, or such an execution as he could effect consistently with the incapacities under which the cargo might labor. Where such an incapacity on the part of the cargo occurs, he has done his utmost to carry the contract on to its consummation; it is a final execution as to the owner of the ship, inasmuch as it does not lie with him that the contract is not performed.

The general principle has been stated very correctly, that where a neutral vessel is brought in on account of the cargo, the ship is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo" (Edwards, 57).

The following cases also support the doctrine that the owner is entitled to freight where the cargo does not go forward because of difficulties connected with cargo.

Rumball v. *Puig*, 34 Fed., 665.

Snow v. *350 Tons of Mahogany*, 46 Fed., 129.

Cargo ex Galam, 2 Moore's Privy Council Reports (N. S.), 216.

In *The Allanwilde*, 247 Fed., 236, which is the only case holding that freight cannot be retained, the vessel had broken ground and returned to port because of damage. It was not a cargo license case. The District Judge stated that he decided the case on its peculiar equities, and that he was much influenced by the fact that the infirmity lay in the vessel, not in the cargo. He said (p. 238):

"The government's embargo was not directed against cargoes of the kind covered by this charter party, but against sailing vessels entering particular waters known as the 'war zone.'"

In the case at bar the whole difficulty arose in the shipper's not procuring the cargo license within a reasonable time.

3. It is not the ship but the shipper which is in default.

As stated in the certified question, the steamer has been at all times ready and willing to perform. The shipper is certainly in no position to say to the shipowner, who has spent more than the usual time necessary to make the entire voyage, that it regrets its inability to obtain a government license, and that consequently the shipowner must return the freight and receive no compensation whatever for the long period spent in endeavoring to take the cargo to destination.

FIFTH POINT.

The contention of appellant that the retention clause is against the policy of this country and contrary to the Harter Act.

There is no merit in the contention made in the 11th and 12th articles of the appellant's brief that the retention clause is against the public policy of the United States, and tends to limit unreasonably the liability of the shipowner as a common carrier and is in violation of the Harter Act. Such a contention must have been overruled many times during the years that have passed since the law was established as to the right of carriers to contract for prepaid freight.

1. Public policy and the Harter Act allow the carrier to throw the risk of loss of the goods on the shipper when not caused by the carrier's negligence. Risk of loss of freight is similar.

There is abundant authority that a carrier may throw the risk of the *loss of the goods* upon the shipper, unless the loss is due to the carrier's fault, or to some defect in the vessel. The same bargain can be made with regard to the freight.

The Harter Act deals entirely with the liability of the ship for *loss of* or *damage to* the goods. It contains nothing with respect to the freight payable on the goods. The cases to which we have referred in the Second Point were all decided since the Harter Act went into effect and clearly show that there is nothing illegal in the clauses of the bill of lading referred to.

Because of the many cases sustaining freight retention clauses, the appellant is forced to make the

argument of public policy and the applicability of the Harter Act turn on the question whether the vessel has broken ground. It admits that according to well established authority if a sailing vessel loaded a cargo of coal in two days and started on a voyage to South Africa, which would take three months, a bill of lading might provide that the freight should be paid in advance and need not be returned if the vessel had once passed Sandy Hook. There would, in that case, be no lack of consideration and nothing contrary to public policy or the Harter Act. In the case at bar, however, and in most of the cargo license cases, where a shipowner has spent a longer period than the entire voyage would ordinarily occupy in serving the libelant, but has not passed Sandy Hook, the libelant claims that there is a lack of consideration, and that a provision in the bill of lading that the freight shall be earned on shipment is contrary to public policy and to the Harter Act. A mere statement of the libelant's position brings its own refutation. The consideration in the case at bar is greater than in the ordinary voyage, and nothing can be found in the Harter Act or public policy which requires a line to be drawn between the two cases.

2. The argument of public policy and the Harter Act, in this connection, a novel one.

The questions of public policy and the Harter Act have not been raised in the *Chambers* case or in the *Illawilda* case by any of the counsel or any of the judges in any of the courts. To assent to the argument made by the learned counsel for the appellant, is to assume that counsel and Court in these cases overlook a perfectly obvious point. We therefore will not discuss the question

further in the brief, but have dealt with it in Appendix B, page 44, should the Court desire to consider the question further.

Conclusion.

We respectfully submit: (1) that both by law and public policy the exporter is bound to procure the licenses required by the United States, and submit the necessary information to the authorities to enable them to pass upon the propriety of the export, the facts relating to each shipment being facts peculiarly within the exporter's knowledge; (2) that when the exporter fails to procure such a license and because of such failure the goods cannot be carried forward, he cannot recover back his freight from the carrier; and (3) that under the well established decisions the exporter and carrier may contract by bill of lading that the freight shall be paid in advance, and that it shall be considered earned on shipment, and that where there is such a provision in the bill of lading the exporter cannot recover back the freight when the voyage is prevented by a prohibition of the United States Government, even when such a prohibition relates to the character of the ship.

The question of the Circuit Court of Appeals should be answered in the affirmative.

New York, December 4, 1918.

Respectfully submitted,

CHARLES S. HAIGHT,
CLARENCE BISHOP SMITH,
Counsel for Claimant-Appellee

APPENDIX A.

Cases sustaining the validity of clauses in bills of lading which provide that freight shall be considered "earned" on shipment and shall not be surrendered "vessel or cargo lost or not lost."

1. The freight retention clause construed.

In *Portland Flouring Mills* v. *British & Foreign Marine Insurance Company*, 130 Fed., 860 (C. C. A., 9th Circuit), flour had been shipped at Portland, Oregon, on the S. S. *Knight Commander* to be carried to China and Japan. The bill of lading provided "the several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit." The steamer became a total loss off the coast of Japan. It was held that the clause in the bill of lading, quoted above, was valid and enforcible, and that the shippers must pay the freight. The Circuit Court of Appeals says:

"The contract as made between the parties is a valid one, that can be enforced. It is true as claimed by appellant, that, where there is not specific agreement to the contrary, freight is not deemed earned until the voyage is completed, and the goods are delivered or ready to be delivered at the point of destination. But this principle has no application whatever to a case like the present, where it is expressly provided:

> 'The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit.'

The true rule in regard to contracts of this character was thus expressed by Lord Ellenborough, C. J., in 1815, in *De Silvale* v. *Kendall*, 4 M. & S., 37, 42:

'By the policy of the law of England freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent to the parties to a charter party to covenant by express stipulations in such manner as to control the general operation of law. The question in this case is whether the parties have not so covenanted by the stipulations of this charter party. If the charter party be silent, the law will demand a performance of the voyage; for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words not express, but sufficiently intelligible to that end, that a part of the freight (using the word "freight") should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate? * * * And there can be no doubt that the payment of freight may by the agreement of the parties be so exempted.'

In 7 *Am. & Eng. Enc. of Law*, 246, it is said:

'It is competent for the parties to a contract of affreightment to stipulate expressly that the freight, or a part thereof, shall be payable absolutely at the time of the shipment of the cargo, or at a certain time thereafter, without regard to performance of the contract'" (130 Fed., 863-864).

The *Portland Flouring Mills* case really goes further than it is necessary for the Court to go in the case at bar, since in that case the steamship company did not merely retain freight which had been paid in advance, but actually sued for and recovered the freight from the shippers. A writ of certiorari to review this case was denied (195 U. S., 629).

A decision to the same effect was made in *The Queensmore*, 53 Fed., 1022 (Circuit Court of Appeals, 4th Circuit). In that case cattle were shipped on the S. S. *Queensmore* to be carried from Baltimore to Liverpool. On account of various

maritime disasters the steamship and her cargo became a total loss. It was held that under the provisions of the contract under which the cattle were carried the shipowners were entitled to be paid the freight.

In *Pacific Coast Company* v. *Reynolds*, 114 Fed., 877 (C. C. A., 9th Circuit), the steamship *Corona*, while on a voyage from Seattle to points in Alaska, ran upon a reef and greatly damaged her cargo. The owners of the *Corona* brought proceedings to limit their liability, and the question before the Court was as to how much of the *Corona's* freight must be surrendered in the limitation of liability proceedings which require the surrender of "pending freight." The Court points out that under the ordinary rule freight is not earned until the voyage is completed and holds that with regard to the freight due on the cargo, this rule applied, and that as this freight was not earned by the ship it did not have to be surrendered. With regard, however, to prepaid passage money, the Court held that by reason of a stipulation in the contracts under which the passengers were carried, the passage money was earned, although the voyage was not completed. The Court says with regard to this point:

"Included, also, within freight pending, as found and decreed by the court below, is the item of $7,770 prepaid passage money. It is insisted on the part of the appellant that passage money and freight are governed by the same rules, and that the passage money was no more earned by the *Corona* than was the freight. There is in this case, however, this important distinction between the two items: In the contract between the owner and the passengers there was this express stipulation, to wit, 'In the event of the loss or detention of the steamer during the voyage, the vessel, her owners or charterers, shall not * * * refund the amount of passage.' This was not, as argued by counsel

for the appellant, a collateral contract, such, for instance, as a contract for insurance upon the vessel or freight which, it was held in the case of *The City of Norwich*, *supra*, and in other cases, need not be surrendered by the owner in a limited liability proceeding, but the stipulation here entered into and constituted a part of the contract of carriage itself. As therefore the passage money in question was prepaid under an express agreement that the owner of the ship should not refund it, notwithstanding a failure to deliver the passengers at the place of destination, we think it clear that it must be regarded as earned" (114 Fed., 882).

In *Burn Line* v. *United States & Australasia Steamship Company*, 162 Fed., 298 (C. C. A. 2nd Circuit), the United States & Australasia Steamship Company had chartered the steamship *Oakburn* for a voyage from New York to Australia. The United States & Australasia Steamship Company put up the ship on its own line as a general ship and gave the shippers its own line bills of lading signed by it in the master's name by his authority. The Steamship Company also collected from the shippers freight in advance. The bills of lading provided:

"Freight prepaid is considered earned at time of payment, and is not recoverable, ship lost or not lost."

Under the contract between the United States & Australasia Steamship Company and the owner the freight was to be a lump sum of £9225. One-third of this sum, less 3½ per cent. to cover interest and insurance, was to be paid ten days after final sailing from New York. Another third was to be paid two months after sailing of the steamer, and the balance on right and true delivery of the cargo. The steamer sailed from New York on April 18th and

on April 28th the first installment of the charter money was paid. On May 21st the steamship ran on a reef on the west coast of Africa and became with her cargo a total loss. The second installment of charter money did not become due until June 18th after the loss of ship and cargo, and the shipowner sued the Steamship Company to recover it.

The Circuit Court of Appeals held that although the United States & Australasia Steamship Company had collected freight in advance from the shippers which under the terms of the bills of lading was not recoverable, still the shipowner was not entitled to payment of the second installment of the freight money, because there was no provision in the contract making this due if the ship did not reach its destination. The Court says:

"The prepaid bill of lading freight, even if the goods were not delivered, could not be recovered by the shippers on account of the clause above mentioned.

"Of course, the result would then be that the charterer, by virtue of having collected prepaid freight, would be actually better off by the loss of the ship than if she had arrived and delivered her cargo, because it would be obliged to pay the owners only one-third of the charter money, whereas it had collected from the shippers more than the whole of the charter money. But there would be nothing inequitable in this, because it would be profiting by the better bargain it had made with the shippers in the bills of lading than the owners had made with it in the charter party (*Willett* v. *Phillips*, 8 Ben., 459; Fed. Cas. No. 17,683; *Carver on Carriage by Sea*, §§ 151 to 161).

"If we have correctly construed the contract, there is nothing inequitable in the charterer retaining the bill of lading freight prepaid by the shippers, even if the owners, for want of a similar clause in the charter party, are unable to recover from the charterer" (162 Fed., 300, 301).

In *The Appam,* 243 Fed., 230, the question before the Court was as to the right of the shipowner to enforce a lien for freight upon the proceeds of goods which had been shipped upon the steamship *Appam* and had been brought into the United States when the *Appam* was captured by the German Cruiser *Moewe*. The goods were shipped at various ports on the West Coast of Africa and were to be delivered at Liverpool. The bills of lading provided:

"Freight is due on shipment, and shall be considered as then earned, and shall be paid on demand, ship or goods lost or not lost."

Judge Hough held for various reasons, which need not be discussed, that the libel must be dismissed, because there was no lien upon the goods. He held, however, that the shippers were liable to pay freight under the terms of the bills of lading, although the goods had never been carried to destination. He says:

"Unless the lien insisted upon can be sustained, the shipowner cannot recover, for the *Appam's* voyage has never been completed, and right delivery tendered. I assume that the shippers are liable *in personam* on the bills of lading, and either at law or in admiralty, because they agreed to pay the freight, and upon a valuable consideration. On this point no difference is thought to exist between our law and that of Great Britain (*National etc. Co.* v. *Internat. Etc. Co.* [C. C. A., 2d], 241 Fed., 861)." (243 Fed., at 232, 233.)

In *National Steam Navigation Company Ltd.* v. *International Paper Company*, 241 Fed., 861 (C. C. A., 2nd Cir.), the International Paper Company had, on August 30th, 1915, made an agreement with the Steamship Company to ship paper on the steamship *Athenai* to be carried to Piraeus under the terms of the steamship's bill of lading. The

Steamship Company furnished its bills of lading to the paper company and the bills of lading were filled out by the paper company and delivered to the Steamship Company on September 15th for signature. On September 16th, the steamer sailed.

On September 17th, fire broke out on the steamer and on September 19th the steamer became a total loss. Up to this time the freight had not been paid by the paper company. The contract under which the paper was shipped provided that the freight should be prepaid. The provisions of the bill of lading were as follows:

"It is hereby expressly agreed that the freight and primage (as per margin), having been prepaid by the shippers, became wholly due, and belonged absolutely to the steamer, without recovery, upon the receipt of the goods into the custody of said steamer, ship lost or not lost.

"10. * * * Freight to be paid, if payable by shippers, is due in full on signing of the bills of lading; if payable by consignees, on arrival of the goods at the port of discharge; settlement in either case to be made in exchange for bill of lading or delivery order.

"11. Also that the freight prepaid will not be returned, goods lost or not lost" (241 Fed., 862).

It was held by the Circuit Court of Appeals that the shipowner was entitled to tender the bills of lading to the shipper and recover the freight, *although this was not done until after the goods had been lost.* Judge Ward says for the Circuit Court of Appeals:

"The obligation of the ship to carry, and of the shipper to pay for the carriage, *accrues when the goods are delivered to the ship.* The special terms as to how much and how and when freight is to be paid are fixed by the bill of lading. It is a matter of constructions in each case.

In this particular bill the intention that freight is payable, goods lost or not lost, is prominent throughout." (Italics ours, 241 Fed., 863.)

Affter referring to an argument made on behalf of the paper company with regard to the use of the word "due" in the bill of lading, Judge Ward continues:

"This is consistent with the primary intention, that runs through the whole bill of lading, that all risk of loss of the ship and goods is on the shipper, and with the clause that prepaid freight was wholly due, and belonged to the steamer upon receipt of the goods, ship lost or not lost. We so construe this bill of lading" (241 Fed., 863).

2. The fact that the "Bris" did not "break ground" is immaterial.

The appellant contends that because the steamship did not technically "break ground," the freight paid in advance could not be retained. The rule is well settled in the maritime law that the lien of the cargo owner upon the ship for damage to or loss of cargo and the lien of the shipowner upon the cargo for freight and charges, begins from the time that the cargo is delivered to the ship. This lien is a reciprocal one.

In the *Bird of Paradise*, 5 Wall., 545, which was a case in which the nature of a lien upon the cargo for the freight was discussed, the Supreme Court says:

"Whenever the owners of the ship constitute one party, and the owners of the cargo the other, the law of freight applies, and the fundamental rule, says Mr. Parsons, is that the rights of the respective parties are reciprocal, and that each has a lien against the other to enforce those rights, and the

better opinion is, that *the lien for freight commences as soon as the goods are delivered into the control of the master, or certainly as soon as they are put on board.* 2 Pars. Cont. (5th ed.) 286; Abb. Ship., 462; *Fragano* v. *Long*, 4 B. & C., 219; *Cooke* v. *Wilson*, 1 C. B. (N. S.), 153; *Tindal* v. *Taylor*, 4 El. & B., 219; S. C., 28 Eng. L. & E., 210; Macl. Ship., 353" (5 Wall., 562-563). (Italics ours.)

In *Pearce* v. *The Thomas Newton*, 41 Fed., 106, the Court says:

"There are two liens in a contract of affreightment—the one, of the vessel on the freight; the other, of the freight on the vessel. The owner of the cargo has a lien upon the ship for the safe custody, due transport, and right delivery of the same, as much as the ship-owner has upon the cargo for freight. *The Maggie Hammond*, 9 Wall., 435. This lien begins upon the receipt of the goods for shipment. Upon such receipt the goods are 'shipped.' 1 Pars. Mar. Law, 132; Conk. Adm., 151" (41 Fed., 108).

In *National Steam Navigation Co.* v. *International Paper Co.*, 241 Fed., 861, the Circuit Court of Appeals says:

"The obligation of the ship to carry, and of the shipper to pay for the carriage, accrues when the goods are delivered to the ship. The special terms as to how much and how and *when* freight is to be paid are fixed by the bill of lading" (241 Fed., at p. 863). (Italics ours.)

In *The Saturnus*, 250 Fed., 407; C. C. A., 2nd Circ., the Court learnedly discusses the nature of the maritime lien as between ship and cargo, and says:

"* * * the mutual obligations of the personified ship and personified cargo begin when they are in charge of the same master, *i.e.*, the captain,

and cover only what occurs during that period of union. In the United States this union, in contemplation of law, begins when the ship is ready to receive cargo and ends when a reasonable time has elapsed for putting it overside" (250 Fed., 412).

In *Carver on Carriage by Sea* (6th Ed., Sec. 269), it is said, in discussing the effect of the shipment of the goods between shipowner and goods owner:

"The contract is that these goods shall be carried to the agreed destination, and it cannot if valid be put an end to by one party only. 'A merchant who has laden goods cannot insist upon having them relanded and delivered to him without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him.' In *Tindall* v. *Taylor*, Lord Campbell cited this passage with approval, and proceeded: 'It is argued that there can be no lien on the goods for freight not yet earned or due; but when the goods *were laden*, to be carried on a particular voyage, there was a contract that the master should carry them in the ship upon that voyage for freight; and the general rule is that a contract once made cannot be dissolved, except with the consent of both the contracting parties. By the usage of trade, the merchant, if he re-demands the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them; but these are conditions to be performed before the original contract can be affected by the demand of the goods.'" (Italics in original.)

This principle was applied in the case of *Blowers* v. *One Wire Rope Cable*, 19 Fed., 444, a decision by Judge Addison Brown. In that case a cable company had made a contract with a manufacturing company by which the manufacturing company was to manufacture for the cable company a wire rope

cable, to be laid in the Erie Canal. In order to transport the cable from the premises of the manufacturing company to the canal, the cable company chartered a vessel at the rate of $5 per day. The vessel proceeded to the premises of the manufacturing company and began to take in the cable. After waiting some time it became evident that the cable company was in financial difficulties and would probably be unable either to pay the purchase price of the cable or the hire of the vessel. The greater portion of the cable had been loaded on board, but the manufacturing company still retained a hold thereon by keeping one end of the cable attached to its premises. The owner of the vessel filed a libel against the cable *in rem* in order to recover his freight. It was held that freight could be recovered, although the vessel had never "broken ground." Judge Brown says:

"I understand the law, as generally administered, to be that the lien of the vessel upon the goods, and of the goods upon the vessel, attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground. *The Bird of Paradise*, 5 Wall., 545, 562, 563; *Bulkley v. Naumkeag, etc., Co.*, 24 How., 386, 393; *The Yankee Blade*, 19 How., 82; 1 Pars. Shipp. & Adm., 174 and notes; *The Hermitage*, 4 Blatchf., 474; *The Eddy*, 5 Wall., 481, 494. This objection, therefore, cannot be sustained" (19 Fed., 446).

It is clear, therefore, that the fact that the vessel does or does not break ground is immaterial, so far as regards the earning of freight.

In the case at bar, the parties have distinctly agreed by their contract that the freight was earned "on shipment," and there is no controversy but that the merchandise was "shipped" (Libel, paragraph 2, Answer, paragraph 2). No valid reason

can be suggested why their contract should not be enforced.

APPENDIX B.

The rules of law with regard to the contracts of common carriers and the provisions of the Harter Act do not prevent the claimant retaining the freight paid in advance.

In order to demonstrate the fallacy of the argument of the appellant, it will be necessary briefly to discuss in historical order the important cases relating to the limitation of the liability of common carrier in the Federal Courts.

The Lexington (*New Jersey Steam Navigation Co. v. Merchants Bank*), 6 How., 344 (1848), is only of historical interest. The owners of the *Lexington* were held liable when their steamer was destroyed by fire. The decision is said to have led to the enactment of the Limitation of Liability Acts in 1851.

York Mfg. Co. v. Railroad Co., 3 Wall., 107 (1866). Cotton in the possession of the carrier was destroyed by fire. There was an exception of fire in the bill of lading. It was held that the carrier could lawfully limit its liability. The Court says:

"Nor do we perceive any good reason, on principle, why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only; it involves simply rights of property; and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire."

The decision has been law ever since, and was approved in the recent case of *Cau* v. *Texas & Pac. R. Co.*, 194 U. S., 427.

New York Central R. Co. v. *Lockwood* (1873), 17 Wall., 357 (Appellant's Brief, p. 8). A drover, while accompanying a shipment of cattle, was injured by the negligence of the railroad. The contract under which the cattle were carried relieved the railroad company from liability for negligence. It was held that a common carrier could not validly contract against the negligence of its servants.

The Montana (1888), 129 U. S., 397 (Appellant's Brief, p. 9). In that case goods were shipped at New York to be carried to England. They were lost by negligent navigation in British waters. It was held that the contract of carriage, being made in the United States, was governed by American law, and that the exemption from negligence in the bill of lading was invalid.

In 1893 the Harter Act was passed. In the case at bar only Sections 1, 2 and 3 of that Act need be considered. These sections read as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, to properly equip, man, provisions, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Section 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The dominant purpose in that Act was to put American shipowners on an equality with those of foreign countries. This is stated by the Supreme Court in *The Irrawaddy*, 171 U. S., 187, where it is said:

"Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned

by negligence or fault in the officers and crew, because such a contract was held by the Federal courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American shipowner, and Congress thought fit to remove the disadvantage * * *." (171 U. S., at 192.)

See also:

The Jason, 225 U. S., 32.

In other words, the Harter Act is an enabling and not a restrictive statute. It is true that it forbids the insertion in bills of lading of agreements whereby carriers shall be relieved from liability due to negligence in loading, stowage, custody, care, etc. But such agreements would have been invalid even without the statute. The effect of the statute was to allow the carrier to escape liability from losses due to errors in management or navigation, but otherwise the carrier's position remains as at common law.

Thus a carrier may protect himself in his bill of lading from damage due to breakage, unless the breakage is due to negligence, *The Henry B. Hyde*, 90 Fed., 114; or for damage due to strikes, *The Toronto*, 174 Fed., 632; or for losses due to theft not due to the carrier's negligence, *Cunard S. S. Co.* v. *Kelley*, 115 Fed., 678. It is unnecessary to multiply the citations. It is clear that there was no negligence on the part of the carrier in this case, and there can be no reason, as there is no authority, why the risk of the loss of the freight should not be assumed by the shipper, as it was competent for the shipper to assume the risk of the loss of the

goods. If the appellant's contention were valid, all the cases allowing the carrier to retain, and indeed, even to collect prepaid freight, would have been wrongly decided. The contract must be valid at its inception or not at all. Its enforcibility cannot be determined by subsequent events. Therefore, if the carrier may legally contract to retain freight in case his ship is sunk by a submarine or forced to return, the contract must also be legal, athough the vessel has never broken ground. This reasoning is given force to by the fact that it could not make any substantial difference to the shipper whether or not the ship had ever started upon her voyage. The shipper desires to have his goods reach their destination, and it must be a matter of no importance to him whether they are carried one mile or one hundred miles.

Certain other authorities were referred to in appellant's brief. Thus *The Caledonia*, 157 U. S., 124, and *The Carib Prince*, 170 U. S., 655, were cited on page 12 for the proposition that in some way the Harter Act made the provisions in the bill of lading in the case at bar illegal.

The Caledonia had nothing to do with the Harter Act as the cause of action arose before the passage of that statute. All that was decided was that an exception of "defects" in steam boilers did not include a defect existing at the time of shipment, which rendered the ship unseaworthy. The ground for the decision was that exceptions should not be construed to limit the carrier's obligation to provide a seaworthy ship unless clearly so expressed. *The Carib Prince* also did not directly concern the Harter Act. In that case, cargo was damaged because of a latent defect in a rivet. There was an exception of "latent defects" in the bill of lading. It was held, following the rule in *The Caledonia*,

that this meant only latent defects arising after the voyage had commenced, and did not limit the carrier's obligation to supply a seaworthy ship. The Harter Act was involved only in so far as the Court held that that Act *proprio vigore* did not reduce the carrier's obligation to furnish a seaworthy ship.

There can be no contention in the case at bar that the *Bris* was not entirely seaworthy, and that it was not altogether the fault of the cargo that it was not carried to destination.

In *Calderon* v. *Atlas Steamship Co.*, 170 U. S., 272, cited page 20, the bill of lading provided that the carrier should not be liable for goods which were above the value of $100 per package. After the loss had occurred the carrier attempted to argue that this meant merely that it should not be liable in excess of $100 for any package. The Court held that by this clause the carrier had attempted entirely to exempt itself from liability, and that the clause was therefore invalid.

The case of *Lines* v. *Atlantic Trans. Co.*, 223 Fed., 624, cited page 8, is a decision to the same effect. In other words, the courts have held that the carrier must give the shipper some reasonable notice of the contract which it intends to make in the bill of lading. Vague and unmeaning phrases are inoperative. In the case at bar, however, the bill of lading is absolutely clear. See the opinion of the Circuit Court of Appeals in *National Steam Navigation Co.* v. *International Paper Co.* (*supra*).

The Kensington, 183 U. S., 263, was cited page 19. That was an action by a passenger to recover for damage to her baggage. The carrier insisted that the baggage must either be shipped under the provisions of the Harter Act or that, if shipped as baggage, the carrier should not be liable beyond the sum of 250 francs (about $50). It was held that the

conduct of the carrier was unreasonable and the limitation of the amount of carrier's liability unenforceable. Neither this nor any of the preceding cases in our judgment bears upon the case at bar.

In the District Court, counsel for the libelant ventured the assertion that the courts had become progressively stricter in compelling the carrier to bear the risks of the venture. On the contrary the reverse has been the case. The Harter Act operated to liberate the carrier in a great measure in making contracts with shippers, and at the present day it is realized that there is nothing contrary to public policy in allowing the shipper to agree with the carrier that the shipper is to assume some of the risks of the transportation. It is now recognized that the question is really one of freight and insurance. If the carrier is unduly burdened with risks of transportation, he must, in order to compensate himself, increase his freight rate. Thus the shipper has the benefit of increased risk by paying a lower freight. This is undoubtedly the correct economic theory, because the shipper knows the nature of his goods and the profit which he expects to make out of them much better than the carrier can, and he is accordingly much more competent to insure himself against loss. It is true that there are some losses which may not be put upon the shipper, but those are losses which could be avoided by skill and care on the part of the carrier and his servants. The rule does not apply to losses due to governmental action, which no skill or care could avert.

In *George N. Pierce Co.* v. *Wells Fargo & Co.*, 236 U. S., 278, the action was brought to recover $20,000 for the loss of certain automobiles which had been shipped by the defendant express company. The contract under which the automobiles were shipped limited the defendant's liability to

$50. The Court held that no more than $50 could be recovered, saying:

"The case as made therefore presents the question whether one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to $50, which is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods, is entitled in case of loss to recover the full value of the property. * * *

"The facts detailed show that there was nothing unfair in the contract. It was made between competent parties, dealing at arm's length, and for the purpose, so far as the shipper was concerned, of securing the lower rate, it deliberately took upon itself the risk of lessened recovery in case of loss for the sake of the lower rate" (236 U. S., 283, 284).

The Court will note that most of the authorities relied on by the libelant as tending to show that an agreement between shipper and carrier that freight paid in advance is to be retained is illegal, are railroad cases. Without in any wise admitting that even under the rules as stated in the railroad cases the freight in this case could not be retained, appellee nevertheless desires to point out that there is a great deal of difference between a ship carrying the goods of more than one person and a railroad. A railroad has usually an absolute monopoly, for the reason that it is only the larger cities that are connected by more than one line of railroad. This fact has induced the Courts to lend their aid in protecting shippers by railroad. On the other hand, the sea is free to all. If shippers by sea are dissatisfied with the terms insisted on by the ship, they may ship by another ship, or buy or charter a steamer of their own; in other words, the parties deal on an equality.

APPENDIX C.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

The Malcolm Baxter, Jr.	62—260

This is a suit *in rem* in the admiralty against the schooner *Malcolm Baxter, Jr.*, to recover freight prepaid under the terms of a charter-party entered into between the parties on January 23, 1917.

The claimant was the owner of the schooner and the libelant the owner of a cargo of corn oil-meal which they wished to ship to Holland. The charter-party provided that the schooner should carry the cargo to Rotterdam, and that the libelant should pay $38 a ton; "full freight to be prepaid in New York when vessel loaded, without discount, and earned, retained and irrevocable vessel and/or cargo lost or not lost." Later it provided, "Cargo to be consigned to the Netherlands Overseas Trust of the Netherland Government. Any detention of the vessel by Great Britain or her Allies to count as lay days against charterers if detained longer than forty-eight hours." It contained no exceptions in favor of the ship.

A permit has been issued by the Netherlands Overseas Trust on November 14, 1916, to a Dutch firm, "The Widow Cleyndert," the real consignee, under which, however, the cargo was to be shipped "by one of the shipping companies affiliated by the Netherlands Overseas Trust," and which did not, therefore, cover the *Baxter*. On January 26, 1917,

recognizing the insufficiency of this permit, The Widow Cleyndert applied to the Netherlands Overseas Trust for another to allow the cargo to be shipped on the *Baxter*, upon which no action was definitely taken until April 4, when the Trust withdrew its original permit unless the cargo went forward by steamer. The British Government had meanwhile decided to pass no sailing vessels with contraband, which the cargo was. Between January 26 and shortly before April 4, this question had been in some doubt, and it does not certainly appear whether or not any sailing vessels had passed the blockade.

Meanwhile the loading was completed early in February and the libelant made independent efforts to secure the necessary permit through The Widow Cleyndert but, as has appeared, without success. As the lay days had long since expired and as there appeared to be no prospect of the schooner's getting through the blockade, on March 29, the libelant denounced the charter-party and discharged the schooner early in April under an agreement between the parties not necessary to detail.

The second article of the libel contained the following allegations explanatory of the practice which obtained in the forwarding of Dutch cargoes, and in view of which the charter-party was drawn:

"That the Allies, having enforced by this means an effectual supervision over all merchandise entering Holland by sea, entered into an agreement with the Netherlands Government by which all merchandise whatever, should be consigned to the Netherlands Overseas Trust Company, hereinafter called the Trust. The Trust, as libelant is informed and believes, is a corporation in the nature of a Chamber of Commerce for the Kingdom of the Netherlands, acting under the control of the Dutch Government, to which all goods destined for Holland

by sea are required to be consigned, the real interest in the merchandise being retained by the merchants dealing therein. Before the goods can be consigned to the Trust, the permission of the Trust has, by agreement between the Trust and the British Government, first to be obtained, and the permission so obtained constitutes a permit recognized by the Allied patrol vessels and men-of-war, and requires the captains of the Allied patrol vessels and men-of-war to permit the cargo to proceed to the Dutch port to which they are consigned; that in the absence of such permission the British Government treats such cargoes as contraband and seizes and confiscates the same, and refuses to permit the vessel to proceed to her Dutch destination."

The libelant's position rests upon the theory that the schooner was in default in that it had appeared that the voyage was impossible, and that it was idle to require of the claimant performance which would not only have been frustrated, but would have involved the parties in heavy loss.

A. Leo Everett for the Libelant.
Clarence B. Smith for the Claimant.

Learned Hand, *D. J.*:

There is no absolute certainty that the claimant would have failed in performance. That he was willing to try must be assumed, and if he is to be treated as in default it can only be upon the hypothesis that the *Baxter* could by no possibility have escaped the blockade. That her chances were very slight is true enough, but the conclusion in some part must rest in supposition, for perhaps some schooners did slip through and she might have been one. When, as here, the obligor remains willing, nothing short of certainty can impose upon him a default

on the score of impossibility. Hence the case really fails at the outset.

Passing this point and assuming that the case is to be judged as though the *Baxter* had been restrained in her voyage by princes or peoples, the case is still with the claimant. I shall assume, without deciding, that the absence of any exception put the owners in default, though the voyage were frustrated by the restraint of princes; still, viewing the charter-party as a whole it seems to me clear that in accepting any such risk the owners provided for their safety by the clause written into the charter-party that the cargo should be consigned to the Netherlands Overseas Trust. This the libelant answers by saying that the words mean no more than that the bill of lading should be in favor of the Trust, just as in an ordinary consignment. The libel itself contains allegations which refute that interpretation. The situation was this: No cargoes could go forward to Holland without the consent of the Trust, which was the only agency trusted by Great Britain to distribute supplies to the Dutch. The Trust was not the true consignee in the usual sense at all; all it did was to insure to Great Britain's satisfaction that the cargoes should not leave Holland. As a part of the system the preliminary consent of the Trust was necessary. With such a consent the ship could pass the British cordon, without it it would be stopped, if detected. There was therefore no conceivable reason for a clause, certainly intended to expedite the ship, which went no further than to provide for a consignment to the Netherlands Overseas Trust in the usual sense. Such a provision would not have helped the ship; rather it would have excited suspicion and promoted delays and eventual discharge in a British port, if upon being overhauled by a

cruiser, the bill of lading had shown the consignment of a cargo, to whose entry the Trust had not consented. It is clear, therefore, that the provision must be read in the light of the surrounding facts all set forth in the second article of the libel, showing that the permit of the Trust was considered as a condition to a consignment of the cargo.

An analysis of the succeeding clause, also written into the charter-party, makes this conclusion stronger. It is provided that for any detention over forty-eight hours by Great Britain or her Allies the charterer shall pay demurrage. Now, if it were intended that the cargo might be consigned to the Netherlands Overseas Trust without its consent, this imposed upon the charterer a prohibitive risk. Such a consignment would not have protected the ship, but, on the other hand, would have stopped the voyage altogether. It was hardly intended that the charterer must go on indefinitely paying demurrage, yet it is hard to see how demurrage could stop, at least before the ship was discharged. What was intended was that she should be protected by a consignment fortified by a permit, which would shorten detention and insure the completion of the voyage. It is therefore unreasonable to suppose that with such a provision in the charter-party for demurrage either party meant to attempt a venture, dependent upon the ability of a sailing vessel to escape the British cordon, and to impose upon the charterer a vague and extremely onerous liability if she did not.

Hence from every view it seems to me clear that the consignment presupposed a preliminary permit, and this the libelant never procured. Performance of that covenant was a condition precedent to performance by the owners, who were not obliged to carry any cargo other than that described.

Thus they are not in default, and the rule in the *Gracie D. Chambers* applies. Indeed, since the default was the cause of the frustration of the voyage, it is not necessary to invoke the rule in that case, for if the charterer defaults in his covenants he is in no event in a position to recover.

The libelant's argument does not impress me, based upon the improbability of such a contract. I see no reason to suppose that it anticipated any difficult in getting the permit. The "Widow Cleyndert" had already got the permit of November 14, 1916, and it must have seemed an easy thing to secure the slight change necessary. Unhappily the general situation had also changed and performance had become impossible. That, under the hard rule which the charterer itself invokes, would not excuse performance. Even if it would, the case would then stand with each party excused by impossibility of performance, in which event the rule in the *Gracie D. Chambers* would again apply.

From the best possible aspect, therefore, that case controls, and the libel must be dismissed, with costs.

October 15, 1918.

LEARNED HAND,
D. J.